

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-1037

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN CAPRA, LEOLUCA GUARINO, STEPHEN DELLACAVA,
ROBERT JERMAIN, GEORGE HARRIS and ALAN MORRIS,
Defendants-Appellants.

On Appeal from Judgment of Conviction from the United States
District Court for the Southern District of New York

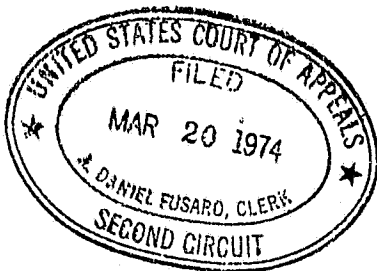
APPENDIX

for Appellants Jermain, Harris and Morris

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Attorney for Appellant Harris
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(212) 732-2270



PAGINATION AS IN ORIGINAL COPY

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ORIGINAL DOCUMENT
UNITED STATES DISTRICT COURT

JUDGE FRANKEL

73 CRIM. 130

C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.: 201-5170 Lawrence S. Feld, ASST.
vs.		For Defendant:
1) JOHN CARPIS, a/k/a "Bugs"	all counts	
2) ISOLUGA GUERINO, a/k/a "Spike"	all counts	
3) STEPHEN DELLACAVA, a/k/a "Beansy"	all counts	
4) JOHN CARUSO	ct. 1	
5) ROBERT J. JERMAN, a/k/a "Frank"	cts. 1, 2, 3, 4, 5	
6) GEORGE HARRIS, a/k/a "Cincinnati"	ct. 1	
7) EARL STES	ct. 1	
8) ALAN MORRIS, a/k/a "Underworld"	ct. 1	
9) JOSEPH MESSINA	ct. 1	
10) JACK FROWN	ct. 1	
11) CARMELO GARCIA, a/k/a "Chino"	ct. 1 & 6	

(07) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk	7/17/73	100-100000		
J.S. 3 mailed 1, 2, 3, 5, 6, 6	Marshal	7/17/73	100-100000		
Violation	Docket fee	7/17/73	100-100000		
Title					
Sec.					
sec below					
--- SIX COSTS ---					

DATE	PROCEEDINGS
	26:7237(L) and 21:816 - Conspiracy to violate narcotic laws (cts. 1)
	26:7205(a) and 7237(L) - sale of heroin, 1 not in pursuance of written order (cts. 2)
	21:812, 811(a)(1) and 811(b)(1)(A) - dist. and poss. with intent to dist. heroin, 1 (cts. 1, 3, 6)
4-16-73	Filed Indictment and ordered sealed for 30 days. F/W ordered. -- Ryan, J.
5-21-73	Indictment unsealed this date in open Court -- Frankel, J.
	case assigned to Judge Frankel as a related matter (73 CR 131)
6-21-73	JERMAN - Filed affirmation of Leonard J. Levenson and notice of motion for an order releasing defendant on a F.P.I. - ret. 5-21-73 at 4:15 P.M.
6-22-73	JERMAN - Filed affirmation of Leonard J. Levenson in re request to release deft. on F.P.I. pending trial.

COURT OF

-- OVER --

DATE

PROCEEDINGS

- 5-22-73 **Alvin Morris** - Court directs entry of not guilty plea. Deft. remanded.
Capra, Guarino, DeLacava, Jermain, Harris, Messina & Garcia - All defendants enter plea of not guilty. Bails set on 73 CR 331 carried to this indictment. 10 days for motions.
- 5-22-73 **Jermain** - (Atty. present) Application for reduction of bail granted. Bail previously set at \$75,000. on indictment 73 CR 331 is vacated. Bail conditions on this indictment are as set forth in Attorneys (Leonard J. Levinson) affirmation dtd. May 22, 1973 and filed on 5-22-73, which are:
 Deed of the home of Jean Ferricks and \$2,000. cash to be posted by Lucille Eife with the Clerk of the Court. In addition a \$15,000. P.R.L. is to be posted which is to be co-signed by deft. and Christine Ignelzi, Carol Ann Disperio and Paula E. Dinterio. Deft. is to report daily to the U.S. Atty. Bail limits to include Eastern District of New York. Deft. remanded. -- Frankel, J.
- 5-23-73 **GEORGE HARRISON** - Filed notice of motion for reduction of bail - Ret. 5-24-73.
- 5-25-73 **Jarmain** - Filed appearance bond #22833; in the sum \$15,000.00 dtd. 5/24/73
- 5-25-73 **Morris** - Filed copy of deft's financial affidavit.
- 5-21-73 **MORRIS** - Deft. produced on writ from Wayne County Jail, Detroit, Mich. Joseph I. Stone appointed counsel by court under C.J.A. No bail set. - writ adj. to June 2, 1973 -- Frankel, J.
- 5-21-73 **HARRIS** - (Atty. present) Application for reduction of bail granted. Bail is set at \$75,000. P.R.L. secured by \$1,000. cash and deed to home of Miss Williams. Miss Williams to co-sign bond. The same bail conditions apply to 73 CR 392. Deft. remanded in lieu of bail. -- Frankel, J.
- 5-25-73 **SHES** - Stuart Holtzman, Esq. appointed as counsel under C.J.A. Deft. enters plea of not guilty. Bail as set in Eastern District of Mich., \$3,000. P.R.L. sec. by \$300. continued on this indictment. -- Frankel, J.
- 5-25-72 **Morris** - File appointment of CJA atty Joseph I. Stone 277 Broadway.
- 5-31-73 **Carmelo Garcia** - Filed the following motions this date:
 Filed motion to disclose electronic surveillance.
 Filed motion to disclose inducement, promises and payments to prospective Government witnesses.
 Filed motion for severance pursuant to Rule 14, F.R.C.P.
 Filed motion to inspect Grand Jury minutes.
 Filed motion for discovery and inspection.
 Filed motion for bill of particulars.
 Filed motion to produce evidence favorable to the defendant.
 Filed motion for identification hearing.
- 4-73 **Guarino** - Filed affirmation and notice of motion to suppress.
- 6-73 **A. MORRIS** - Filed affirmation & notice of motion for a bill of particulars, discovery & inspection for a severance etc..
- 5-2-73 **Robert Jermain** - Filed affirmation and notice of motion for an order modifying bail conditions as originally set on 5-24-73

Defendant

Attorney

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New Rochelle, N.Y.

Leoluca Guarino
4 Seven Oaks
Melville, L.I., N.Y.

Stephen Dellacava
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John Caruso

Robert Jermain
6 Bonaire Drive
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George Harris
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(in custody)

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DATE	PROCEEDINGS
15-73	Jermain-Filed memo endorsed on defts application for modification of defts bail conditions., Application denied. Frankel, J.
15-73	ROBERT JERMAIN-Filed memo endorsed on motion filed 1-6-73 Application denied. So Ordered--Frankel, J. <i>Frankel</i>
21-73	John Capra- Filed Defendants Memorandum of Law.
20-73	Dellacava-Filed deft's memorandum of law.
20-73	ALL DEFTS.- Filed Memorandum to Counsel-Court is unable to reach motions & trial until mid-September.--Frankel, J. Mailed notices 7-23-73.
26-73	Filed Gov't Bill of Particulars.
30-73	Filed afdvt. of Gerald A. Peffer, AUSA DTD. 6-19-73
30-73	Filed afdvt. of Lawrence S. Feld, AUSA dtd. 6-19-73
30-73	CARMELO GARCIA -Filed memo endorsed on motion to inspect G.J. minutes..MOTION DENIED Frankel, J.
30-73	CARMELO GARCIA -Filed memo endorsed on motion to disclose electronic surveillance Motion Granted on consent. So ordered. Frankel, J.
30-73	C. GARCIA-Filed memo endorsed on motion for severance...Motion denied..Frankel, J.
30-73	Filed afdvt. of Lawrence S. Feld, AUSA dtd. 6-20-73
30-73	Filed Gov't's memorandum of law
30-73	Filed CAPRA'S REPLY memorandum
30-73	Filed Memorandum..The motion for particulars by DELLACAVA and GUARINO****the Court concludes that the items to which the Govt consents supply sufficient particulars ****The foregoing embodies the court's order****No settlement is necessary.... Frankel, J.... Mailed notice...
30-73	J. CAPRA - Filed memorandum****The motion to dismiss superseding indictment is denied. Motion for discovery of grand jury minutes is denied. The motion to suppress *** denied without prejudice..The demand for discovery and a bill particulars is granted to the extent of the govts consent. Etc....Frankel, J. Mailed notice.
30-73	A. MORRIS-Filed memorandum..The Govt has consented in considerable measure to the relief sought by the motion of deft dated 6-1-73 Except in the respect hereinafter granted, the remaining items of the motion are denied...Frankel, J. M/N
30-73	Filed afdvt. of L.S. Feld, AUSA dtd. 6-19-73..
30-73	CARMELO GARCIA - Filed memo endorsed on motion filed 5-31-73..This motion contains more uncritical boiler plate than able counsel ought to permit****the govt has made discriminating judgments and consented to the proper items of discovery. Except to the extent of that consent, this motion is denied...So ordered...Frankel, J.
20-73	ALL DEFTS - Filed Gov't's notice of readiness for trial.
10-73	Filed Transcript of record of proceedings, dated July 30, 1973
19-73	LEOLUCA GUARINO - Received letter from Russell & McIlroy dat 8-30-73 stating that they appear as counsel.

DATE	PROCEEDINGS
Aug. 22-73	S. DELLACAVA - Filed notice of motion & afdvt. to suppress evidence.
Sept. 4-73	S. DELLACAVA - Filed stipulation that Lawrence K. Reitel, Esq. of 1150 B'Way NYC is substituted as trial counsel in place of Michael L. Santangelo.
Sept 5-73	S. DELLACAVA - Filed afdvt. of G.A. Pfeffer, AUSA dtd 9-5-73 in opposition to motion to suppress.
Sept 5-73	J. CAPRA - Filed defts Affidavit & Notice of Motion for an order dismissing the indictment or for a hearing in order to suppress all evidence seized herein or for a severance, and for such other further relief as to this Court may seem just and proper.
Sept 5-73	J. Capra - Filed defts memorandum of law.
Sept 5-73	Filed letter of Barry Ivan Slotnick dated 9-5-73.
Sept 5-73	Filed memorandum for minimization hearing*****A hearing is set to commence on the morning of Sept 17, 1973 (Notice mailed)
9-6-73	S. DELLACAVA - Filed notice of motion & afdvt. to suppress evidence..
9-10-73	L. GUARINO - Filed notice of motion for an order admitting Dennis D. McAlevy, Esq. pro hoc vice as atty. for Leoluca Guarino
9-10-73	S.D. CAVA) L. GUARINO) Filed notice of motion & afdvt. to suppress evidence J. CAPRA)
9-10-73	S.D. CAVA) L. GUARINO) J. CAPRA) Filed notice of motion & afdvt. 1. declaring the 1st Count of the indictment duplicitous 2. Striking the alia, Spike 3. Suppressing information gained as a result of the illegal arrest etc.
9-11-73	J. MESSINA - Filed afdvt. & notice of motion to suppress evidence with memo endorsed. This motion is denied.....Frankel, J.....m/n
9-11-73	J. MESSINA - Filed Govt's memorandum in opposition to motion to suppress.
9-13-73	G. GARCIA - Filed afdvt. of L.S. Feld, AUSA for aux a Writ of Habeas Corpus
9-14-73	ALL DEFTS - Filed supplemental bill of particulars.
9-17-73	GEORGE HARRIS - Filed Second Offender Information
9-17-73	LEOLUCA GUARINO - Filed Second Offender Information
9-17-73	ALAN MORRIS - Filed Second Offender Information
9-17-73	STEPHEN DELLACAVA - Filed Second offender Information
9-17-73	STEPHEN DELLACAVA - Second Offender Information under indictment C123-464
9-17-73	STEPHEN DELLACAVA - Filed Information - C123-465
9-18-73	J. CAPRA - Filed memo endorsed on motion filed 9-10-73...Motion granted. No ordered.

Frankel, J.

Cont'd. on page 5

DATE	PROCEEDINGS
9-1-73	ROBERT JERMAIN - Filed notice of motion for an order severing the defts. pursuant to Rule 1.
9-1-73	ROBERT JERMAIN - Filed defts. memo of law.
9-20-73	ALAN MORRIS - Filed notice of motion to suppress.
9-20-73	STEVEN DELLACAVA) JOHN CAPRA) Filed affidvts of both depts dtd. 9-20-73.
9-21-73	ALAN MORRIS - Filed Order To Show Cause re: criminal contempt on 10-1-73. Frankel, J.
9-21-73	STEPHEN DELLACAVA, et al. - Filed deft. Dellacava's memo of law regarding Suppression of the April 13-73 Search Product.
9-20-73	ROBERT JERMAIN motion for severance, and memo-endorsed - Upon further consideration as a result of this motion, I have concluded that the statement giving rise to the motion will be excluded. Hence, while it has served an obviously useful purpose, the motion is no longer necessary. It is accordingly denied. So Ordered, Frankel, J. (m/n)
9-24-73	Earl Starns - Filed defendants financial affidavit.
9-26-73	ROBERT MORRIS - Filed OJA copy / 5 appointment of David Blackstone, Esq., 335 E 4th, NYC as counsel for defendant - Frankel, J.
9-9-73	STEVEN DELLACAVA - Filed affidv & notice of motion for an order suppressing certain statements of the deft.
9-17-73	Minimization hearing commenced
9-18-73	Cont'd. Deft Garcias's bail exonerated. Bail in the amount of \$5,000 cash or surety bond set by the court... Remanded.
9-19-73	Hearing cont'd.
9-20-73	Hearing cont'd.
9-21-73	Hearing cont'd.
9-22-73	Hearing cont'd.
9-23-73	Hearing cont'd.
9-24-73	Hearing cont'd. and adj'd to Oct. 2, 1973
9-27-73	Hearing cont'd & concluded - Decision reserved.
9-27-73	Filed memo endorsed on order to show cause dtd 9-24-73 The matter is adj'd to 10:30 a.m. 10-11-73 and trial will be held at that time. So ordered Grissa, J.
9-27-73	Filed memorandum for counsel re: A memorandum relating to the automobile search will be filed in the next day or so. Frankel, J.
9-28-73	R. J. MORRIS - Filed affidv. of G.A. Foffer, AUSA dtd. 10-10-73 for a writ of H/C
9-28-73	Filed supplemental bill of particulars.

DATE	PROCEEDINGS
10-23-73	PAUL SIEG - Filed GJA appointment of Stuart Holtzman Esq. 233 B'way NYC 10007
10-29-73	J. CAPRA - Filed GJA authorization of No. Dist. Court R. porters
10-29-73	R. JERMAINE - Filed GJA authorization of No. Dist. Court porters
10-31-73	Filed Govt's exhibit 35260. Ordered sealed and to be placed with the clerk in his vault in cashiers office....Frankel, J.

10-18-73	J. CAPRA) L. GUARINO) S. DELLACAVA) - JURY TRIAL BEGUN Defts SIEG, JERMAINE and CAPRA covered from R. JERMAINE) trial, upon Govt's motion. Count 6 is dismissed as to all depts G. HARRIS) A. MORRIS)
10-19-73	Trial cont'd.
10-23-73	Trial cont'd.
10-24-73	Trial cont'd.
10-25-73	Trial cont'd.
10-26-73	Trial cont'd.
10-28-73	Trial cont'd.
10-30-73	Trial cont'd.
10-31-73	Trial cont'd.
11-1-73	Filed one envelope Govt. Exhibit 35324 ordered sealed and placed in vault...Frankel, J.
11-9-73	Filed Court exhibit 1 ordered sealed and placed in vault....Frankel, J.
11-9-73	Filed order that U.S. Marshal deliver Herbert Sparling before Judge Frankel on Nov. 13-73....Frankel, J. Mailed notice
11-12-73	Filed affdvt. of D. McAlevy in support of writ of habeas corpus.
11-14-73	Filed affirmation of L.J. Levenson in support of a writ.
11-15-73	Filed order that U.S. Marshal deliver Thomas Lentini before Judge Frankel on 11-15-73
11-15-73	GEORGE HARRIS - Filed affdvt. of L.S. Feld, AUSA in support of a Writ of H/C
11-1-73	TRIAL Cont'd.
11-2-73	Trial Cont'd.
11-5-73	Trial Cont'd.
11-7-73	Trial Cont'd.
11-8-73	Trial Cont'd.
11-9-73	Trial Cont'd.
11-13-73	Trial cont'd. Govt. Rest.
11-14-73	Trial cont'd.
11-15-73	Trial cont'd.
11-16-73	Trial cont'd.
11-19-73	Trial cont'd. Jury starts deliberation
11-20-73	Trial cont'd. Jury resumes deliberation
11-21-73	Trial cont'd. Jury returns verdict as follows:---CAPRA, GUARINO, DELLACAVA and JERMAINE found GUILTY on all counts 1, 2, 3 & 4 & cont'd. on present bail condition until 10 a.m. Nov. 23, 1973 at which time they are to surrender to U.S. Marshal in the Court...DEPTS HARRIS & MORRIS found guilty on Count 1. P.S.I. ordered on all depts Sent. date is Jan. 3, 1974....Frankel, J.

11/21/73

110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	FILED
11-27-73	DELLA CAVA - Filed opinion #110047 The motion to suppress is denied...So Ordered, Frankel, J.... Mailed notice.	
11-23-73	JOHN CAPRA) STEVEN DELLA CAVA) LEOLUCA GUARINO) ROBERT JERMAIN) Deft's surrendered to custody of U.S. Marshal pending sentence.	
2-4-73	Filed opinion # 40082 ***examining the conduct of the legal and police officials following Dec.12,72 the court concludes that it was reasonable and outlary is not warranted.***the motion to suppress evidence from the Diane's Bar interceptions was denied.....Frankel, J.	
12-5-73	Filed opinion #40093 Supplementing the court's memorandum of Nov.27-73***Having in mind the familiar rule that an agency's transgression of its own regulations may constitute a deprivation of due process***FRANKEL, J. /copy of	
12-18-73	Filed letter dated 12-17-73 to Judge Marvin E. Frankel from Paul J. Curran, U.S. Atty. with memorandums attached.	
12-26-73	Filed Mailed original. CJA copy 1 to the A.O. Wash.D.C. for payment of Reporters Frankel, J.	
12-27-73	Filed memorandum opinion #110150 ***as the motion in this case was originally presented upon affidvts, the claim of a possessory interest by the movants J. Capra, L. Guarino and S. Della Cava was in general and conclusory terms**** This was not an intrusion initiated by law enforcement officers with the specific intent of discovering evidence of a crime. In short the court would sustain this as an essentially private search and a lawful seizure under authorities not always perfectly harmonious but sufficient in their net effect to validate what was done here.....Frankel, J.....Mailed notice to atty's.	
1-3-74	L. GUARINO - Filed affdvt. of deft. in response to the information filed by the Govt. pursuant to 21 U.S.C. Sec. 851	
1-3-74	JOHN CAPRA - Filed Judgment (# 74, 08 33) Atty. Barry I. Slotnick, present. The deft is committed for a period of FIFTEEN(15) YEARS on each of counts 1, 2, 3, and 5 to run concurrently with each other. THREE(3) YEARS on count 4 to run consecutively with sentence imposed on counts 1, 2, 3 and 5. On counts 1, 4, and 5, pursuant to the provisions of Section 841 of Title 21, U.S. Code, deft is placed on Special Parole for a period of SIX(6) YEARS in addition to said term of imprisonment....Deft is fined \$25,000 on count 1 and \$20,000 on count 2. Total fine \$45,000....The Court recommends that the deft be confined at Federal Detention Center, West St., N.Y., pending appeal if overtaxed facilities make that possible.....FRANKEL, J.....Docketed 1-7-74 NO BAIL SET. REMAINED.	
(SEE PAGE 8)		

DATE	PROCEEDINGS
1-3-74	LEOLUCA GUARINO-Filed Judgment (#74037) //Atty.Dennis D.S.McAlevy present. The deft is committed for imprisonment for a period of FIFTEEN(15)YEARS on each of counts 1,2,3,and 5 to run concurrently with each other. THREE (3)YEARS on count 4 to run consecutively with sentence imposed on counts 1,2,3 and 5. On counts 1,4 and 5, pursuant to the provisions of Section 841 of Tl.21, U.S.Code, deft is placed on SPECIAL PAROLE for a period of SIX(6)YEARS in addition to said term of imprisonment. Deft is fined \$25,000 on count 1 and \$20,000 on count 2. Total fine \$45,000.. The Court recommends that the deft be confined at Federal Detention Center, West.,N.Y. pending appeal if overtaxed facilities make that possible. NO BAIL. REMANDED. FRANKEL,J.....Docketed 1-7-74....
1-3-74	STEPHEN DELACAVA- Filed Judgment. Atty. Lawrence Feltell, present. The deft is committed for imprisonment for a period of FIFTEEN (15) YEARS on each counts 1,2,3, 4, and 5 to run concurrently with each other. On counts 1,4 and 5, pursuant to the provisions of Section 841 of Tl. 21 U.S.CODE deft. is placed on Special PAROLE for a period of SIX (6) YEARS IN ADDITION TO said term of imprisonment. Court recommends that the deft be confined at Federal Detention Center, West Street, New York, N.Y. pending appeal if overtaxed facilities make that possible. FRANKEL, J..... DOCKETED 1-7-74 No bail. Remanded.
1-3-74	ROBERT JERMAIN-Filed Judgment.(Atty.Leonard J.Levenson,present)The deft is committed for imprisonment for a period of TWELVE(12)YEARS on each of counts 1,2,3,4 and 5 to run concurrently with each other. On counts 1, 4 and 5,pursuant to the provisions of Section 841 of Tl.21, U.S.Code, deft is placed on Special Parole for a period of SIX(6)YEARS in addition to said term of imprisonment...The Court recommends that the deft. be confined at Federal Detention Center, West St.N.Y., pending appeal if overtaxed facilities make that possible.....FRANKEL, J.....docketed 1-7-74 Deft is remanded.....
1-3-74	ALAN MORRIS- FILED JUDGMENT. ATTY. JOSEPH I. STONE, PRESENT.The deft is committed for imprisonment, for a period of EIGHT (8) YEARS. Sentence to run conc with the sentence imposed in the U.S.D.C. EAST DIST OF MICHIGAN on 8-15-73, Docket #15683 The COURT RECOMMENDS that the deft be confined at Federal Detention Center, West Street, New York, N.Y. pending appeal if overtaxed facilities make that possible; Frankel, J. Docketed: 1-7-74 Deft is Remanded....
1-8-74	Filed memorandum ex.#10185 on pretrial publicity...The events leading to the trial in this case included actions by law enforcement officers resulting in massive and lurid publicity for their activities***Defts have moved to dismiss the indictment or have convictions set aside***This court subject to wiser opinions from above deems such relief excessive and unjustifiable.*****Frankel, J...
1-9-74	ALAN MORRIS - Filed notice of appeal..Mailed copy to Alan Morris Fed.Detention Headquarters 427 West St. NYC & U.S.Att'y. S.D.N.Y. Joseph I.Stone,Esq. 277 B'way NYC.....Appeal allowed in forma pauperis...Frankel,J. Entered on Docket 1-9-74...
1-9-74	ROBERT JERMAIN - Filed notice of appeal..Mailed copy to Leonard J.Levenson,Esq. 11 Park Pl.NYC & U.S.Att'y.S.D.N.Y.....Leave to appeal in forma pauperis granted on 1-8-74..Frankel,J. Entered on docket 1-9-74

DATE	PROCEEDINGS
1-10-74	STEPHEN DELLACAVA - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Stephen Dellacava 427 West St. NYC Ent. on docket 1-10-74..
1-11-74	LEOLUCA GUARINO - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Deft at Fed. Detention Headquarters West St. N.Y. Ent. on docket 1-11-74..
1-11-74	JOHN CAPRA - Filed notice of appeal from judgment of 1-3-74. Copies to U.S. Atty. & Deft J. Capra 15 Northwood Circle New Rochelle, N.Y. Ent. on docket 1-11-74....
1-11-74	Filed Govt's memorandum of law in opposition to motions of CAPRA, GUARINO and DELLACAVA.
1-14-74	Filed deft's memorandum on motion to suppress the Toledo Search Product
1-14-74	Filed Govt's memorandum of law in opposition to motion to suppress.
1-14-74	GEORGE HARRIS - Filed notice of appeal from final judgment. Filed copies to U.S. Atty. G. Harris Fed. House of Detention NYC D. Blackstone 335 Broadway NYC.... Memo endorsed Leave to file notice of appeal in forma pauperis is granted.... Frankel, J. Ent. on docket 1-14-74...
1-11-74	GEORGE HARRIS - Filed Judgment (David Blackstone, atty. present) the deft is committed for imprisonment for a period of THIRTEEN YEARS. Sentence to run concurrently with sentence imposed under indictment 73Cr. 392.... Pursuant to the provision of Section 841 of Tl. 21, U.S.C., deft is placed on Special Parole for a period of FIVE YEARS in addition to said term of imprisonment.... Remanded. Frankel, J. docketed 1-15-74....
1-15-74	Filed memorandum... In the judgments in this case, the court apprised of the proposed appeals and urged to make consultation with counsel as convenient as possible***The Court will not go beyond the suggestion*** Frankel, J. n/n
1-16-74	S. D. CAYH Filed remand dated 11-23-73
1-16-74	R. JERMAIN Filed remand dated 11-23-73
1-16-74	S. CAPRA Filed remand dated 11-23-73
1-16-74	L. GUARINO Filed remand dated 11-23-73
1-16-74	L. GUARINO Filed commitment & entered return, Deft. delivered to F.D.H. ON 1-3-
1-16-74	S. CAPRA Filed commitment & entered return, Deft. delivered to F.D.H. ON 1-3-
1-16-74	R. JERMAIN Filed commitment & entered return, Deft. delivered to F.D.H. ON 1-3-
1-16-74	S. DELLACAVA Filed commitment & entered return, Deft. delivered to F.D.H. ON 1-3-
1-24-74	Filed transcript of record of proceedings, dated OCT. 16, 19, 23, 24, 25, 1973
1-24-74	Filed transcript of record of proceedings, dated OCT. 26, 29, 30, 31, 1973
1-24-74	Filed transcript of record of proceedings, dated Nov. 8, 9, 13, 1973
1-24-74	Filed transcript of record of proceedings, dated Nov. 14, 15, 16, 1973
1-24-74	Filed transcript of record of proceedings, dated Nov. 19, 20, 21, 1973
1-24-74	Filed transcript of record of proceedings, dated Nov. 24, 25, 27, 1973
1-24-74	Filed transcript of record of proceedings, dated 1-3-74

A-1
INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

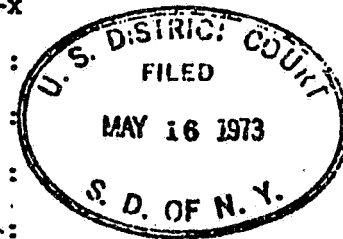
73 CR. 460

UNITED STATES OF AMERICA,

-v-

JOHN CAPRA, a/k/a "Hooks",
LEOLUCA GUARINO, a/k/a "Spike",
STEPHEN DELLACAVA, a/k/a "Beansy",
JOHN CARUSO,
ROBERT JERMAIN, a/k/a "Frank",
GEORGE HARRIS, a/k/a "Cincinnati",
EARL SIMMS,
ALAN MORRIS, a/k/a "Underworld",
JOSEPH MESSINA,
JACK BROWN and CARMELO GARCIA,
a/k/a "Chino",

Defendants.



INDICTMENT

S 73 Cr.

The Grand Jury charges:

1. From on or about the 1st day of July, 1969 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy", JOHN CARUSO, ROBERT JERMAIN, a/k/a "Frank", GEORGE HARRIS, a/k/a "Cincinnati", EARL SIMMS, ALAN MORRIS, a/k/a "Underworld", JOSEPH MESSINA, JACK BROWN and CARMELO GARCIA, a/k/a "Chino", the defendants, and Herbert Sperling, Willie Middlebrook, Harold Mc Spadden, Joseph Conforti, Jack Spada, Joaquin Ramos, a/k/a "Gino", Horace Stanley Marabel, Jimmy Rosa and Louis Oliveras, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about November 5, 1970, defendants ROBERT JERMAIN, a/k/a "Frank", EARL SIMMS, GEORGE HARRIS, a/k/a "Circinnati" and co-conspirator Joaquin Ramos met at Tom's Villabianca Restaurant, Bronx, New York.

2. On or about November 5, 1970, co-conspirator Joaquin Ramos met in the Bronx, New York with defendant STEPHEN DELLACAVA, a/k/a "Beansy" and negotiated for the sale of a quantity of heroin.
3. In or about May, 1971, co-conspirator Joaquin Ramos met with defendants JOHN CAPRA, a/k/a "Hooks", and LEOLUCA GUARINO, a/k/a "Spike".
4. In or about October, 1971, co-conspirator Joaquin Ramos had a discussion with defendants JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", and STEPHEN DELLACAVA, a/k/a "Beansy" concerning the sale of six kilograms of heroin and one kilogram of cocaine.
5. In or about September, 1971, defendant ALAN MORRIS, a/k/a "Underworld", and co-conspirator Willie Middlebrook brought approximately \$150,000 in United States Currency to the Lincoln Motor Inn, New York, New York.
6. On or about January 17, 1972, co-conspirator Louis Oliveras had a conversation with defendant LEOLUCA GUARINO, a/k/a "Spike" concerning the sale of one half kilogram of heroin.
7. In or about March, 1973, defendants JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", JOHN CARUSO and co-conspirators Herbert Sperling, Jack Spada and Joseph Conforti went to the vicinity of the Stage Delicatessen, 7th Avenue and 54th Street, New York, New York.
8. In or about April, 1973, defendant JOHN CARUSO transported approximately six kilograms of heroin to a motel on Long Island, New York.

(Title 26, United States Code, Section 7237(b) and Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

In or about the month of August, 1970, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, and co-conspirator Joaquin Ramos, a/k/a "Gino", unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Alan Morris, a/k/a "Underworld", approximately two kilograms of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Alan Morris, a/k/a "Underworld", on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, Sections 4705(a) and 7237(b), United States Code; Title 18, United States Code, Section 2).

COUNT THREE

The Grand Jury further charges:

On or about the 6th day of November, 1970, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to George Harris, a/k/a "Cincinnati" approximately one kilogram of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said George Harris, a/k/a "Cincinnati" on a form issued in blank for that purpose by th

Secretary of the Treasury of the United States or his delegate.

(Title 26, United States Code, Sections 4705(a) and 7237(b); Title 18, United States Code, Section 2).

COUNT FOUR

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately five and one-half kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT FIVE

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT SIX

The Grand Jury further charges:

On or about the 17th day of January, 1972, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy", and CARMELO GARCIA, a/k/a "Chino, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

Richard St. Louis
Foreman

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, JR.
United States Attorney

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By B. Edwards
Deputy Clerk

CHARGE OF THE COURT

THE COURT: (Frankel J.) Now, Mr. Edgehill and ladies and gentlemen of the jury. I note it is exactly a month since you heard the first witness in this case. All the efforts of counsel in the day since October 19 culminate now as we approach the critical and ultimate stage of this case, the time when the case will be given to you for your decision, reflecting your efforts to discover the truth about the events that gave rise to this case.

It is a time for me to remind you very briefly of a number of our different and separate functions and the general nature of your critical responsibilities.

It is my task, it is the trial Judge's task to rule during a trial on issues of law, to make procedural rulings when there are questions about what evidence should come before the jury and how that evidence should be received.

Your task, as I have said more than once, is the crucial one, the one which is the end objective of any trial in our Courts, the decision of issues of fact presented by this case.

So it is for you to judge the witnesses, weigh the evidence, assess their credibility, draw the inferences

that you find are the correct inferences to be drawn from the evidence you have heard, all of that, and you will remember in this connection the efforts that went into your selection, all of that is to be done coolly, with detachment, without bias or prejudice for or against either side, with an objective frame of mind, not without interest but disinterestedly and impartially.

You would know without my repeating it that this is a very serious business. The administration of criminal law is not a game and so it is no concern of anybody anymore who objected when and to what and whose objections were sustained and whose were overruled and how many of each happened to whom.

It is, as you know, the duty of counsel, in the judgment of counsel, to interpose objections when his judgment leads him to believe that he do so properly. The duty of the judge is to rule on those objections. We are all trained in a forensic and somewhat contentious profession as you know and sometimes the tones get loud and people get testy and people includes in most cases Judges.

But all this is past now and nothing about tone of voice or rulings or attitudes or occasional flashing of mild passion is of any consequence anymore.

Now it is your task and your sovereign task as all of you have been told, to judge the evidence and to seek the truth from it.

It is my job to tell you the rules of law that govern the charges in this case and that govern your deliberations.

It is your responsibility in a fair system of justice to follow these instructions faithfully.

I don't make them up, they come to me from the Congress or from higher Courts. If I give you any instruction that is erroneous, it is on the record and can be corrected. If you deviate from the instructions, then that won't be on the record and that cannot be corrected.

So to run a system of law and not arbitrariness, we have to expect that the jurors will follow the rules of law given to them in instructions like these.

I have told you you will seek the truth and you will seek it from the evidence. I told you at the outset what evidence is and some of the things that it is not. Let me remind you of some things that are not evidence.

The indictment which tells the defendants what they are accused of and tells everyone ultimately what the issues on trial are, the indictment is not evidence.

It is just a set of accusations.

Nothing that has been said to you by counsel is evidence though, as you know, they have a purpose in arguing about the evidence to you. Similarly, nothing that I have said to you or may say to you in these instructions, is evidence. And nothing I said or may have said should or may be taken as importing or suggesting any view of mine on any of the factual issues in the case.

It is not for me to have a view and it is not for you to guess about conceivable views or speculate about them, I have none; the views of the evidence are for you.

So if occasionally in the course of the trial I have put a question or made an inquiry, it should not indicate to you, because it is not meant to indicate and does not indicate, any opinion or thought of mine about what the evidence shows or does not show. All such judgments are for you.

Similarly again you will note that occasionally these instructions will make brief reference to factual assertions or factual issues. Remember that I am not going to do anything remotely resembling another summary of the evidence added to the many hours of summation you just heard.

1 If I refer to evidence or an assertion about
2 the evidence, it is simply to help define any issue for you,
3 to help formulate one or another of the problems that you
4 will confront in the jury room. In doing that, my
5 references to the evidence will be illustrative, they
6 will be incomplete, they may not seem balanced because
7 incomplete references of this kind are not often
8 balanced. But remember they are not summaries and if they
9 seem to stress one side more than another, you may surely
10 believe two things:

11 First, that that is not what I intended and,
12 second, it is of no consequence to you.

13 My occasional references to the evidence and to
14 the arguments about it, as I say, are simply to help
15 formulate one or another of your problems and to help you
16 as you soon proceed to your deliberations.

17 Remember, of course, what is the evidence is
18 primarily the sworn testimony you have heard from the
19 witness stand, it is exhibits, and it is the few facts
20 that you have heard from time to time stipulated to or
21 agreed upon or undisputed.

22 Now, in response to this indictment, which is
23 not evidence, the defendants on trial here have each
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pled not guilty. That means that the burden has been placed upon the government to prove guilt beyond a reasonable doubt before any one of these defendants may be found guilty of any of the charges before you.

That is a burden that never shifts. It is not to be determined by the number of witnesses or the length of the testimony on one side or the other. Whether the burden is sustained is a question that you will answer based on your overall appraisal of this record taken as a whole, of the persuasiveness or lack of persuasiveness of all the evidence, taken together in your review of what you have heard and seen in this trial.

As a corollary of the government's burden of proof in a criminal case, it is also the law that a defendant in a criminal case is not required to prove his innocence. To put this more completely, a defendant in a criminal case is not required to adduce proof of any kind. He is, as you have heard, recalling a basic principle in our law, presumed to be innocent. That presumption existed for these defendants when the trial started, it has remained in their favor throughout, it will be with them when you proceed to the jury room.

It is enough in itself to require you to acquit

unless or until you are convinced of guilt beyond a reasonable doubt.

As a corollary of that principle, since they are not required to produce any evidence of any kind, and for other reasons that we don't need to tarry over, defendants in criminal cases have an absolute and unqualified right in our system to decide for themselves and with counsel whether or not they will take the witness stand. They have a right to refrain from taking the stand and to rely on their cross examination of the government's witnesses and such other evidence as they may choose to present.

Accordingly, to preserve their basic right in its full substance, you must remember that the defendants are not to have any inference drawn against them from their decision not to take the witness stand in this case. That fact should not weigh in any fashion in this case. It should not enter into your deliberations.

I have talked to you about the burden of proof beyond a reasonable doubt and all of you have heard of it surely before today.

We must try to give some content to that notion and proceed to that now.

When we speak in our system of criminal justice

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2 of a reasonable doubt, we mean to begin with what the
3 words attempt to convey, a doubt founded on reason and
4 arising from the evidence or lack of evidence in the case
5 before you.

6 It is a doubt that has substance and is not
7 merely shadowy, a reasonable doubt is one that takes its
8 origin in your judgment, in your common sense and in your
9 experience applied to the record of evidence in the case
10 before you.

11 It is not an excuse to avoid performing an
12 unpleasant duty. It is not a means for extending
13 sympathy to a defendant.

14 A reasonable doubt is the kind of doubt that
15 would cause a prudent person to hesitate before taking
16 action in some matter of importance to himself. To
17 elaborate on this a little bit, if you in your own personal
18 affairs were confronted with a decision of consequence and
19 if you proceeded then to review all the factors and
20 considerations bearing on that decision rationally and
21 objectively, and if after that you found yourself beset by
22 uncertainty and unsure of your judgment, then you would
23 have what we try to define here as a reasonable doubt and
24 the converse of that is also true.

25 If you had such a serious decision to make, and

you engaged in such a detached and rational review of relevant considerations, and, if after that, you found you had no uncertainty and no reservation about your judgment, then you would not have a reasonable doubt.

Proof beyond a reasonable doubt does not mean proof to a positive certainty or beyond any conceivable doubt. If it meant that nobody could ever be convicted in a criminal case where there were issues of fact to be decided. It is in the nature of issues of fact and most clearly of issues of historical fact, things that happened in the past, that such issues cannot be determined with absolute or mathematical certainty.

So that kind of certainty is not what we mean when we talk about proof beyond a reasonable doubt.

On the other hand, I hope that these observations about that basic concept have made clear to you that in a criminal case the prosecution's burden of proof is a very high one and that you may convict only if your mind is free of the kinds of uncertainty and kinds of reservations I have undertaken to describe.

With those basic principles in view and I will supplement them later on in this charge that can't be brief, let us approach the specific accusations in this case and move toward the specific problems presented by this trial

for your decision.

You know the indictment contains five counts or charges of criminal offenses. Each of these counts, as we call them in the law, is a separate accusation of a separate offense or crime. And so, as you come to your efforts to decide them, remember that each calls for a separate determination by you and, in addition, that in each case you will have to make a separate determination as to each separate and individual defendant. That is a thought that we will touch or repeatedly as we go through these instructions.

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SOUTHERN DISTRICT COURT REPORTERS

UNITED STATES COURT HOUSE

FOLLY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLAND 7-4580

Now, the indictment, as you will have it before you for your guidance, and as a sort of checking document, but not of course as evidence, names 11 defendants.

You know that only six of those so named have been involved in this case.

You know therefore that these six individuals are the only persons whose guilt or innocence will be your concern in the jury room.

Remember that in our system questions of guilt or innocence are personal and individual.

We don't follow doctrine of guilt by association. And so, as I say, the guilt or innocence of each of these separate defendants must be determined separately under each count that names him with respect to him, and eventually, on the significance of the evidence or the absence of evidence that you are permitted to consider against that particular defendant.

Now still describing it generally, before we get to its particulars, let me point out to you that the first count names the six defendants here on trial as defendants, and charges them with a conspiracy during a period from 1969 to 1973, a conspiracy that I will particularize later on, but in general, an alleged conspiracy to violate certain Federal laws relating to dealings in

narcotic drugs.

That counsel have referred to and I will refer to for shorthand as the conspiracy count.

Then the remaining four counts, numbered 2, 3, 4 and 5 each charge specific violations of a particular narcotics law, and these are called, and you may have noted these references, these are called the substantive counts.

Now those counts, 2, 3, 4 and 5, involve four of the defendants here: Mr. Capra, Mr. Guarino, Mr. Dellacava and Mr. Jermain.

The remaining two defendants, Mr. Harris and Mr. Morris, are named only in the conspiracy count as defendants, and that, as I said, is the first of the five counts before you.

Now, let me try to outline a little more, and still preliminarily, the nature of these charges, and I will give you a distinction that may be useful as we go along, between the concept of conspiracy, which is involved in Count 1, and the concept of a substantive offense involved in Counts 2, 3, 4 and 5.

In our system, the gist of the idea of conspiracy is an agreement to seek some unlawful objective. The agreement, and I will expand on this when I tell you fully

1 about Count 1, the agreement is the heart of the matter
2 in this criminal concept, and so there may be a conspiracy
3 even though the objective of that conspiracy is never
4 accomplished or completed or carried out.
5

6 Let me take an example that I trust has nothing
7 to do with this case, I believe has nothing to do with
8 this case, merely for illustrative purposes.
9

10 You might have a conspiracy among two or more
11 people to rob a bank, that is, they might agree together
12 to rob a bank, and then they might take one or more steps
13 to carry out that conspiracy. But they might never get
14 around to the point of actually completing or accomplishing
15 the robbery.

16 In that case, that purely hypothetical case,
17 you might have the crime of conspiracy established even
18 though the robbery never occurred. And in that setting, the
19 robbery would be the substantive offense, and the agreement
20 to accomplish it would be the conspiracy.

21 And I give you that, as I say, merely for
22 illustration and perhaps to help with some shorter references
23 as we go along in these instructions.

24 I am going to talk to you a little bit about
25 the statutes, the Congressional enactments involved in this

2 case.

3 In our Federal national system --and I think
4 in substantially all the States -- there are no crimes
5 except as they are defined or created by statute, by
6 laws written by Congress.

7 And so in this case, as in all others, the
8 charges, the accusations against these defendants are
9 made under certain Federal enactments, laws passed by
10 the Congress.

11 It is not going to be necessary for you any
12 more than it is for any of us to memorize or know the words
13 of any of these laws.

14 Nevertheless, I think it will help as background
15 for your later understanding to give you a basic description
16 of the laws that are involved in this case.

17 And there is a small complication that has to
18 do with time because of a change in the law about which I
19 will also tell you.

20 Because of the period that concerns us, extend-
21 ing overall from 1969 to 1973, we are concerned basically
22 with two Federal laws, one that was in force for some years,
23 ending on May 1, 1971; and then another, which replaced
24 that earlier law, and became effective on May 1, 1971.

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2 As I will indicate to you, this is, in the
3 end, much less complicated than it starts out sounding.
4 Nevertheless, I am going to give you this background so
5 that some of the things I say later and some of the things
6 I will read from the indictment will perhaps make more
7 sense to you.

8 Now the law in effect in the years 1969, '70 and
9 up to May 1, 1971, contained certain provisions in Title 26,
10 which is our Tax Code, and specifically Sections 4705(a)
11 and 7237(b) of that title. You don't have to remember
12 those numbers. But basically, and quoting only a very little
13 bit, those provisions made it a crime for any person to
14 sell, barter, exchange or give away narcotic drugs except
15 in pursuance of a written order of the person to whom such
16 article is sold, bartered, exchanged or given, on a form
17 to be issued in blank for that purpose by the Secretary of
18 the Treasury or his delegate.

19 And I have been quoting from that statute.

20 And as you will see soon, the conspiracy charge
21 in this case and two of the substantive counts relate
22 to alleged violations of that statute.

23 Now then, effective May 1, 1971, these pro-
24 visions involving that requirement of an order form were
25 replaced by others which were part of an enactment that is

known as the Comprehensive Drug Abuse Prevention and Control Act of 1970, another act name you don't have to remember.

These new provisions are contained in certain sections of Title 21 of the United States Code, and specifically, though you don't need to know them, that explains why you will hear references I believe to numbers like Section 812, Section 841(a) (1), and Section 841(b) (1) (a), as I read through parts of this indictment.

Now, these provisions, effective May 1, '71, forbid the distribution or the possession of with intent to distribute certain kinds of narcotic drugs in schedules of so-called controlled substances. Heroin is among those, and it is in Schedule I. Cocaine is among those, and it is in Schedule II.

Very simply described, these provisions make it unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute any controlled substance, such as heroin or cocaine.

Now, under the law, both pre-May '71 and post-May '71, it has been a crime to conspire to violate either of those provisions.

With that statutory framework in view, let me again outline, and then go specifically to the charges in the indictment.

Count 1, as I have said, charges a conspiracy during a period '69 to '73. It charges that the conspiracy had as objects violation of both the old statute preceding May 1 and of the new statute following May 1, 1971.

Count 2 alleges a substantive crime, an unlawful transfer without an order form, in August 1970. That is alleged under the old law which was in effect in that year and as I have said to May of 1971.

Similarly, Count 3, which charges a violation in November 1970, is laid under the old law.

Counts 4 and 5 charge violations in October of 1971 and November of 1971, and both of those substantive charges are under the new provisions of Title 21 that I have mentioned to you.

Because the conspiracy charge in Count 1 alleges an unlawful agreement to violate both the old statute and the new, and because those statutes are involved respectively in the four substantive counts, it becomes simplest, I think, and most economical of repetition, of which there is inevitably some, if I proceed in these instructions now to tell you the rules and the problems under Counts 2, 3, 4 and 5, the substantive counts, and then go back, after that, and give you the instructions required

relative to Count 1, the conspiracy count; and I am going to proceed in that fashion.

In each case I am going to read to you the counts of the indictment about which I am giving you these instructions. As I say they will be with you, but I think it gives some concrete meaning to have these read before we proceed to the statement of the necessary elements and other rules relating to these accusations.

Count 2 reads as follows: "The Grand Jury charges: In or about the month of August 1970, in the Southern District of New York" -- well, let me stop there for a minute and mention to you what you may know. The Southern District of New York embraces the counties of Manhattan, the Bronx, Westchester, and other counties moving upstate, in some of which, if I recall, some of you may live.

Each of these counts in this indictment charges violations of law occurring within the Southern District of New York.

I think the summations have made pretty clear to you that that is not a subject of primary concern or dispute, but in any event I mention that to you and I mention to you that you could not find a crime having been committed in this District unless the criminal conduct you found

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beyond a reasonable doubt occurred, as it is alleged, within the Southern District of New York.

Let me go back. In or about the month of August 1970, in the Southern District of New York, John Capra, Leoluca Guarino, Stephen Dellacava and Robert Jermain, the defendants, and co-conspirator Joaquin Ramos, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Alan Morris approximately two kilograms of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of written order of the said Alan Morris, on a form issued in blank for that purpose, by the Secretary of the Treasury of the United States or his delegate.

You will notice the charge that I have just read alleges a sale or giving to Alan Morris, who is a defendant in the first or conspiracy count, but he is not a defendant, though he is named as the buyer, in this substantive count, Count 2.

Count 3 reads this way: On or about the 6th day of November 1970, in the Southern District of New York, John Capra, Leoluca Guarino, Stephen Dellacava, and Robert Jermain, the defendants, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to George Harris approximately one kilogram of heroin, a narcotic drug,

1 in that the said sale, barter, exchange and giving away
2 was not in pursuance of a written order of the said
3 George Harris on a form issued in blank for that purpose
4 by the Secretary of the Treasury of the United States or
5 his delegate.
6

7 What I said about Morris under Count 2 applies
8 to Harris in Count 3. He is named as the recipient or
9 buyer, but he is not a defendant in this count. The four
10 defendants, Capra, Guarino, Dellacava and Jermain are the
11 only ones named in each of the substantive counts.

12 Now, in order to prove guilt under either of
13 these counts, the Government is required to have established
14 beyond a reasonable doubt each and every one of five essential
15 elements. When I say each and every one, I mean just
16 what those words convey. If anyone is not established
17 beyond a reasonable doubt, you must acquit.

18 The five essential elements are these: First,
19 that on or about the dates charged in each of these two
20 counts the defendants named wilfully and knowingly either
21 sold or bartered or exchanged or gave away a narcotic
22 drug. You will notice I put "or" between each of those
23 verbs or participles, and I tell you it is not necessary
24 for the Government, in spite of the form of the indictment,
25 to prove more than one of those prohibited kinds of acts.

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2 If you find a selling or bartering or exchanging or
3 giving away, that is sufficient to establish this first
4 element.

5 Second, that the substance referred to in each
6 of these counts was in fact a narcotic drug, and specifically,
7 heroin.

8 Third, that the narcotic drug was either sold
9 or bartered or exchanged or given to the defendant Alan
10 Morris in Count 2 or the defendant George Harris in Count
11 3.

12 Fourth, that Alan Morris, in the transaction
13 alleged in Count 2, and George Harris, in the transaction
14 alleged in Count 3, did not give to the defendants Capra,
15 Guarino, Dellacava and Jermain, the alleged suppliers,
16 directly or indirectly, any written order for the
17 narcotic drug on a form supplied by the Secretary of the
18 Treasury or his delegate.

19 Fifth, that the defendants named, in selling
20 or bartering or giving away the heroin charged in each of
21 these two counts acted knowingly and wilfully.

22 Now, those five essential elements I think are
23 for the most part self-explanatory, and I won't elaborate
24 especially on most of them.
25

1
2 But let me at this point talk to you a little
3 about a concept that is applicable throughout the case,
4 and then give you an additional item of instruction,
5 bearing specifically on these two substantive counts
6 numbered 2 and 3.

7 You will recall in what I have just read that
8 the fifth essential element requires proof that a defendant
9 was acting knowingly and wilfully on the occasions in ques-
10 tion. Those words, knowingly and wilfully, which appear
11 in the indictment, and appear commonly in instructions,
12 refer to the element of criminal intent in this case, with-
13 out which there could be no conviction.

14 So the words are important.

15 However, they are not mysterious, and their
16 definition is not especially complicated.

17 In order to have acted knowingly and wilfully,
18 a defendant must be shown to have acted deliberately, pur-
19 posely, intentionally, not as a result of mistake or
20 accident or inadvertence.

21 The defendant need not be shown for this purpose
22 to have known that he was violating some particular law
23 or to have known the terms of any law applicable to his
24 conduct. But he must be shown to have been acting with
25

1 a bad or evil purpose in the sense that he knew he was
2 engaging in narcotics dealings forbidden by the criminal
3 law.
4

5 These qualities of knowledge and wilfulness
6 need not be and commonly can't be proved by so-called direct
7 evidence. They relate, as you know, to the state of a
8 person's mind, and normally, though the state of someone's
9 mind is a fact, it is a fact that we can't get at by direct
10 sensory observation, and so here, as in most cases, and
11 as in your daily life when you are trying to figure out
12 the intentions or motives or purposes of people, you
13 must rely on circumstantial evidence.

14 Your task will be to weigh all the facts and
15 circumstances surrounding these defendants and the events
16 in question, to decide whether they or any of them, at those
17 times in question, behaved knowingly and wilfully.

18 You may consider whether you find circumstances
19 of secrecy or intrigue or deviousness or attempts at
20 concealment. You may on the other side consider whether
21 the conduct in question occurred openly and without any
22 attempt at concealment or subterfuge.

23 You will consider such things, and as I have
24 said, all the circumstances that have been laid before you
25 in this case in deciding this essential question of criminal

1 intent, in deciding whether one or more of these defendants
2 has been proved to have been acting knowingly and wilfully.
3

4 The situation is different elsewhere in the
5 case, but you will recall that in connection with its
6 attempts to prove Counts 2 and 3 of this indictment, the
7 Government has not produced the heroin which is alleged
8 to have been transferred on the occasions to which those
9 counts refer.

10 I instruct you now that the law does not require
11 that accusations of this kind must fail unless the narcotic
12 or other substance is physically produced in court.

13 As with other facts in criminal or civil litigation,
14 the Government is permitted to undertake to prove
15 a fact of this nature by circumstantial evidence, and the
16 contention of the prosecution in this case is that the
17 necessary proof has been made in that fashion.

18 As you know without summarizing, but simply
19 referring you to the evidence involved here, the Government
20 relies on the testimony it has produced as to the specific
21 events that it says occurred in August and November 1970
22 in order to establish that at those times there were sales
23 to Alan Morris and George Harris respectively and that
24 what was sold was heroin in approximately the amounts
25 charged in each of the Counts 2 and 3.

1 The prosecution also invokes, as you have heard,
2 evidence as to the transactions which is claimed to show
3 that they were conducted with secrecy, with deviousness.
4 It relies on evidence which it claims to have shown other
5 alleged dealings in a white powder, shown to have been
6 heroin. It relies on the prices allegedly involved in the
7 transactions and on the alleged absence of complaint by
8 the alleged customers.
9

10 These are items, as I say, of circumstantial
11 evidence. It is for you to decide whether the Government
12 has proved beyond a reasonable doubt that the material
13 involved in those two alleged transactions, or either of
14 them, was heroin. If you are not satisfied of that as to
15 either count, then of course you must acquit on that count,
16 and if that is true of both, you must acquit on both.
17

18 Now let me come to the second pair of substantive
19 counts, Counts 4 and 5, both of which are alleged under the
20 law effective May 1, 1971.

21 Again, four of the defendants are involved here,
22 Messrs. Capra, Guarino, Dellacava and Jermain. Mr. Morris
23 and Mr. Harris again are not named as defendants in these
24 two.
25

 Let me read you these last two substantive
counts.

Count 4, the grand jury further charges in or about the month of October 1971, in the Southern District of New York, John Capra, Leoluca Guarino, Stephen Dellacava and Robert Jermain, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 5-1/2 kilograms of heroin.

Count 5. The grand jury further charges in or about the month of October 1971, in the Southern District of New York, John Capra, Leoluca Guarino, Stephen Dellacava and Robert Jermain, the defendants, unlawfully, intentionally, and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

Under each of these two counts, before you may convict on either, the Government must have proved beyond a reasonable doubt each and every one of three essential elements, and these are the three:

First, that the substance the Government claims to have been involved in these transactions was a narcotic drug controlled substance, specifically heroin in Count 4, and cocaine in Count 5.

Second, that on or about the dates alleged, the defendants distributed or possessed with intent to distribute

the substance in question.

Third, that the defendants acted knowingly and wilfully.

I want to elaborate briefly on at least the first two of these three essential elements.

As to the first, the Government alleges that the substances transferred in these two counts were in fact narcotic drug controlled substances. As far as the law is concerned I charge you simply that heroin is a Schedule 1 narcotic drug and cocaine is a Schedule 2 narcotic drug controlled substance.

With respect to these counts, the Government has produced the alleged heroin and cocaine which it says was involved.

If you find beyond a reasonable doubt that the Government has proved by the testimony of the chemists that Exhibits 68A through 68K relating to Count 4 is heroin, and that Exhibit 68L, relating to Count 5, is cocaine, then this element, the nature of the substance, is satisfied as respects each of the counts with respect to which you make such a finding.

As to the second essential element in Counts 4 and 5. The charge is that the defendants distributed or possessed with intent to distribute the narcotic drug

controlled substance in question.

Distribution in this setting, in the circumstances of this case, means simply selling or delivering or transferring.

As to the notion of possession, and possession with intent to distribute, let me say a few words about the meaning of that first word "possession" in this setting.

Basically, to begin with, the word possess has an every-day meaning familiar to you, referring to the having of some object within one's control.

Possession may be of two types, actual or constructive.

Now actual possession means personal, manual, physical control of the thing in question.

Constructive possession exists if the things or thing are or is in the physical possession of some other person, but the defendant or the person alleged to have constructive possession has the power to exercise control over that other person and over the thing or things, over their distribution, over their movement, over their delivery.

In other words, to possess something constructively, you need not have it in your hand or in your pocket. If it is within your power to exercise control over the

1 thing -- and in this case the subject is drugs -- you have
2 constructive possession of that thing.
3

4 Specifically, to speak in terms of what the
5 Government contends and what you may find to have been proved
6 or not proved, the contention is that the transportation
7 of the 5-1/2 kilograms of heroin to Toledo, Ohio, as
8 charged in the fourth count, was allegedly done pursuant
9 to the direction or with the participation of Capra,
10 Guarino, Dellacava and Jermain.

11 If you find that kind of direction and control
12 beyond a reasonable doubt, this would satisfy the requirement
13 of possession within the meaning of the statute.

14 The defendants contend, on the other hand, that
15 the Government has failed to prove beyond a reasonable
16 doubt that they had any connection with this shipment and
17 any possession of the narcotics in question, whether con-
18 structive or otherwise, and that, very briefly, puts one
19 of the key issues for your decision in this case.

20 As to the third essential element in Counts
21 4 and 5, again, the defendants must be found to have
22 acted knowingly and wilfully.

23 I talked to you about the meaning of those words
24 under Counts 2 and 3, and I simply say that what I said
25

in that connection applies again here.

In connection with all four of the substantive counts, the counts numbered 2 through 5, the Government relies on another statute, another enactment of the Congress, and a concept in that statute called aiding and abetting.

Now, under that conception and that statute, it is not necessary for the Government, if the essential elements are otherwise established, to show that a defendant himself physically committed the crime in question.

1
2 The law provides in this statute and elsewhere
3 that a person who aids and abets another to commit an
4 offense is guilty of the offense as if he had committed
5 it himself. The government invokes this rule here and
6 contends that John Capra and Leoluca Guarino should be
7 found guilty as aiders and abettors of Stephen Dellacava
8 and Robert Jermain.

9 I instruct you in this connection that you may
10 find the defendants Capra and Guarino guilty of the offenses
11 charged in Counts 2 through 5, if you are convinced beyond
12 a reasonable doubt that Stephen Dellacava and Robert
13 Jermain committed those offenses, and that the defendants
14 Capra and Guarino aided and abetted them.

15 To find a person guilty as an aider and
16 abetter you must of course find something more than
17 mere knowledge on his part that a crime was being
18 committed.

19 A mere spectator at a crime is not a
20 participant and not an aider and an abetter.

21 It is not necessary, however, as I have said,
22 to find that the defendant himself, accused as an aider
23 and abetter, did any of the acts charged.

24 How do you determine this? To decide whether
25 any particular defendant aided and abetted the commission

2 of an offense, you ask yourselves these questions:

3 Was he associated with the venture? Did he participate
4 in it in some direct capacity as something he wished to
5 accomplish or bring about? Did he seek by his own action
6 to make that enterprise, the criminal enterprise, succeed?
7 If he did, then you may find that he is an aider and an
8 abetter.

9 Now, we come back to Count 1 of the indictment,
10 the conspiracy charge. This in its allegations is somewhat
11 longer than the others but I will read it to you anyhow
12 again for a kind of background and introduction.

13 I am going to read it to you in two installments.
14 I will stop before a heading on the second page of this
15 document called overt acts and later on, for reasons that
16 I think will be apparent, I will come back and read that
17 remaining portion of Count 1. It reads as follows:

18 "The grand jury charges:

19 "1. From on or about the first day of July 1969
20 and continuously thereafter up to and including the date
21 of the filing of this indictment, in the Southern District
22 of New York, and elsewhere, John Capra, Leoluca Guarino,
23 Stephen Dellacava, John Caruso, Robert Jermain, George
24 Harris, Earl Simms, Alan Morris, Joseph Messina, Jack Brown
25 and Carmelo Garcia, the defendants, and Herbert Sperling,

Willie Middlebrook, Harold McSpadden, Joseph Conforti, Jack Spada, Joaquin Ramos, Horace Stanley Marabel, Jimmie Rosa and Louis Oliveras, named herein as co-conspirators and not as defendants, and others to the grand jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841 (a) (1) and 841(b) (1) (A) of Title 21, United States Code.

"2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount thereof being to the grand jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

"3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with

intention to distribute schedule I and II narcotic drug controlled substances, the exact amount thereof being to the grand jury unknown in violation of Sections 812, 841 (a) (1) and 841 (b) (1) (A) of Title 21, United States Code."

Then comes the overt acts and, as I said, I will read those allegations to you in a little while.

This first count, I remind you as far as we are now concerned in this case, involves all six of the defendants on trial in this proceeding. Again, before you may find any defendant guilty of the charge of conspiracy in Count 1, the government must have proved each and every one, in the meaning of that phrase, each and every one of three essential elements and here are the three under the conspiracy charge:

First, that for some period of time between July 1, 1969 and May of 1973, when the indictment here was filed, there was a conspiracy of the kind the government alleges.

Second, that the defendants here on trial or one or more of them knowingly and wilfully participated in that conspiracy.

Third, that someone of the conspirators, whether one of those here on trial or any other, committed at

least one of the overt acts set forth in the indictment for the purpose of furthering the conspiracy.

Again, I am going to elaborate and explain each of these three essential elements.

As to the first, the necessity of proof beyond a reasonable doubt that there was a conspiracy of the kind in question, I have to begin with an understanding of the relevant meaning of that term conspiracy.

A conspiracy for purposes of this case may be defined as an agreement or combination of two or more persons by their concerted action to accomplish some criminal purpose. As I said to you earlier, the unlawful agreement or combination is the gist of this crime of conspiracy.

It is often said that a conspiracy is a kind of partnership in crime in which each member becomes the agent of every other member.

Although we use the standard legal terms like agreement and agency, it is obviously not necessary that in this kind of case the government prove a formal agreement or partnership in the usual lawful sense of those terms.

Common sense tells you and the law embraces common sense in this instance, that when people, if they do enter upon a criminal conspiracy, much is left to informal

2 and unexpressed understanding.

3 In determining here whether the conspiracy
4 alleged has been shown to have existed, your task will be
5 to judge the total picture of the asserted acts and
6 conduct of the alleged conspirators which the government
7 claims occurred in order to promote in concert the
8 criminal objectives of the unlawful dealings in narcotics.

2/ 9 As I mentioned to you also earlier, since the
10 heart of the matter is the unlawful agreement, a conspiracy
11 may be found to have existed even if its objects or
12 purposes were not carried out. In other words, a
13 conspiracy may exist though it does not succeed.

14 At the same time, evidence that one or more
15 objects of the conspiracy were in fact achieved may be taken
16 as evidence that the conspiracy in fact existed.

17 As I said, your task in this case is to take the
18 whole record, take all the evidence together, consider
19 the gaps in the evidence as you may find them to exist,
20 and decide on that total appraisal whether there has been
21 proof beyond a reasonable doubt that two or more of the
22 alleged conspirators agreed expressly or tacitly to
23 pursue the unlawful objects alleged in Count one of this
24 indictment.

25 The government alleges that there was an overall

1 conspiracy in existence for some portion of the time
2 from 1969 to May of 1973.

3
4 The conspiracy is alleged, as you know, to have
5 had a number of participants including the defendants
6 here on trial, other defendants who are not here on trial,
7 and still other people not named as defendants in the
8 indictment.

9 You know that the government charges and claims
10 it proved that there were a variety of roles for the
11 various individuals claimed to have been in the
12 conspiracy.

13 It is alleged that different individuals may
14 have been in the conspiracy for different periods of
15 time, some throughout, some early, some later.

16 Leaving those assertions for you to consider in
17 your deliberations on the evidence, I instruct you now
18 and remind you that Count one does charge a single overall
19 conspiracy and the government must prove such an overall
20 conspiracy in order to make out the first of the three
21 essential elements on which I am now instructing you.

22 So if the government has not established such
23 a conspiracy, but has established only a variety of
24 different and unconnected conspiracies among
25 different people, there would be a failure of proof as to

element one under Count one and you would have to acquit on that count.

You will recall in this connection that one object of this alleged conspiracy was the violation of the statute in effect until May 1, 1971.

That is, an object of violating the law requiring that narcotic drugs not be sold or bartered or given away, without the seller or givers receiving a form for that purpose issued by the Secretary of the Treasury or his delegate.

Then it is said that a second object of the conspiracy, and this would relate to the period after May 1, 1971, was to violate the latest statute, the one that forbids the distribution or possession with intent to distribute schedule 1 and schedule 2 narcotic drug controlled substances, and that is, of course, heroin and cocaine.

I have told you that in our system violations of the criminal law must be put in terms of a duly enacted statute and so I have addressed your attention to the statutes that underlie the chronological portions of this accusation of the conspiracy.

At the same time, I think it is fair to say that both before and after May 1, 1971, the basic wrong alleged

by the government in this case, was the unauthorized sale or transfer of dangerous drugs, such as heroin and cocaine, and the basic nature you must find of the conspiracy alleged in this case throughout that period was a conspiracy to engage in the sale and distribution of such narcotic drugs.

Throughout then you must have in mind the kind of conspiracy charged in this case, the fact that only one is charged, and then you must determine with these thoughts in mind, whether that kind of conspiracy has been established beyond a reasonable doubt.

You will consider this problem of chronology I just mentioned not only in connection with this first element but again in connection with the matter of participation or membership to which I will come presently in dealing with the second element of this offense. Before I get to that let me say a few words about the matter of the duration of a conspiracy in our law.

If you find that the kind of overall conspiracy the government charges has been established, the exact length of its existence is not critical.

Let me amplify that just a little bit.

I have read and re-read to you the allegations of the indictment that charge a conspiracy from about the

1st day of July 1969 up to and including the time the indictment was filed in May of 1973.

All I have told you just now is that the government is not required to prove that the conspiracy actually started and existed over the entire course of that period. It is sufficient if you find that the conspiracy has been proved, it is sufficient on this question of duration, if you are satisfied that such a conspiracy existed for such portion of that total period alleged in the indictment.

Now, if you do not find this first element, that the conspiracy existed, your task on count one, as I have said, you must acquit. On the other hand, if you are satisfied that the conspiracy did exist, you reach the second essential element; you reach the question whether one or more of the defendants whose case you are considering were members of or participants in that conspiracy.

This element of membership must be considered and decided with specific and particular reference to each individual defendant upon whom you are asked to reach a verdict. I emphasize once again that in this respect, quite importantly, as in all others, the question of guilt or innocence is individual and must be considered separately

with respect to each or different individual.

So the participation of any defendant in a conspiracy must be established by evidence as to his own words, his own actions, and his own conduct.

Of course, each individual person's statements and actions may and do take on meaning and significance from the setting in which he acts or speaks.

Thus, in this context as in others, you will consider the behavior, such as you find it to have been, of each person involved in connection with the behavior of other people to the extent that such connections are established to your satisfaction by the evidence.

In addition, there are some specific rules that you have heard fleeting reference to about acts and declarations of co-conspirators and I am going to talk about those in a little while.

First, let me say that to find that any defendant was a member of the conspiracy in this case, you must find that he knew the unlawful purpose or purposes of the conspiracy and knowingly associated himself with them.

The government must establish beyond a reasonable doubt that any particular defendant you are considering entered into the conspiracy, aware of its basic purposes and objects, with a specific criminal intent, that is, with

1 a purpose of violating the laws against narcotic transactions
2 about which I have already told you.

3/

4 Mere association with one or more conspirators
5 does not make a person a member of a conspiracy.
6 Nor is knowledge of a conspiracy without participation
7 sufficient. What is necessary before you may find member-
8 ship is that a defendant associated himself, however
9 informally, with the conspiratorial scheme or plan, knowing
10 the principal purpose or purposes and intending to act
11 in some way to bring about the success of the venture.

12 If a person does participate in that way with
13 knowledge, he may be a member of the conspiracy even if
14 he only participates in some parts or aspects of the
15 conspiratorial aims or agreement. He may be a
16 conspirator in that case even if he doesn't know all of
17 the other participants, and even if he does not actually
18 encounter some or all of the others.

19 The question, to repeat it, is whether a person
20 has voluntarily joined, however informally, in that
21 conspiratorial venture knowing what it is about and meaning
22 to participate in the success of the operation.

23 The guilt of a conspirator is not governed by
24 the extent or duration of his participation, or by the
25 question of whether he had knowledge of all the operations.

Even if a person joined a conspiracy after it is formed, and engages in it to a degree more limited than the engagement or participation of others, he is equally culpable so long as he might be or is a conspirator within the meaning of these conceptions as I have given them to you.

Each member of a conspiracy may perform different acts, distinct acts at different times and places. Some may play larger, some smaller roles. It is not required, as I say, that a person be in from the very start. He may join while the conspiracy is in progress, and, if he does, he may be held liable for what has transpired before he joined and as well what happens afterwards, while he remains a member.

To be specific about that conception, if you find that the conspiracy as charge existed and that both John Capra and Robert Jermain as the government alleges were members, and if you find that Jermain delivered heroin to Alan Morris during the conspiracy and in furtherance of it, then the acts of Jermain may be found to have been binding on Mr. Capra, even though he was not present at the time of their occurrence.

In short, the question as to membership is did a defendant, any particular defendant upon whom you are

1 focusing as you consider these defendants separately and
2 one at a time, did he join one or more of the others in
3 the conspiracy, with an awareness of at least some of its
4 basic purposes and aims.
5

6 If so, then you may find that he was a full member
7 of the conspiracy, and he may be held liable for all of it,
8 even though his participation was partial as to time or as
9 to the extent of the activities in question.

10 Now, throughout I keep stressing the importance
11 of your individual consideration of the defendants. You
12 will realize as you try to sort through the evidence and
13 consider the extent, if any, to which the government has
14 proved its allegations, you will realize that the charges
15 themselves against these defendants are separate and
16 different and distinct as to each individual one.

17 The government claims that the defendants had
18 separate roles and each defendant, and this is
19 important, pleads not guilty to these charges in this
20 and all other respects.

21 In considering whether the membership element
22 has been established, you will, I remind you, take each
23 defendant, one at a time and consider what, if anything,
24 the evidence shows as to him and, on this kind of basis,
25 make up your mind as to his alleged membership or

non-membership, and whether membership as asserted has been proved beyond a reasonable doubt.

I will remind you of this in a little while in the course of these observations that I now make about this subject mentioned earlier of acts and declarations.

I have told you in a fairly standard legal conception that in a sense, one conspirator, one member of a conspiracy, is said to be the agent of every other member. One of the things that follows from this is that if a jury finds from a preponderance of the independent evidence as to each individual alleged member, that people I shall call for the moment A, B and C are all members of a conspiracy, then the acts or declarations of A, even in the absense of B and C, may be taken as evidence against B and C, provided that those acts or declarations occur during the conspiracy and in furtherance of it.

In considering that rule, which I will try to finalize a little bit more in a little while, remember that the rule applies only while any person against whom you are considering some other persons acts or declarations is found by you actually to have been a member of the conspiracy.

At any time when any person is not a member, then no other person's acts or declarations may be considered

against him for any purpose whatsoever, even though they may have been in furtherance of the conspiracy and may have taken place while the conspiracy was in progress.

In this connection I have to tell you about a couple of rules which are not very complex concerning how you measure the duration of a conspiracy, and how you find whether it may have terminated or whether membership of any individual may have terminated. The rules are these:

First, a conspiracy once it has been formed is presumed to continue until its objectives are completed or until there is an affirmative act of termination by one or more of its members; or until it is ended in some other way.

Second, as to any individual alleged to be a member, once a person is found by you to have been a member of the conspiracy, you may find that he continued his membership until the conspiracy ended, unless there is some affirmative proof of withdrawal or disassociation.

And now, you will want to bear those things in mind as I will try to make them a little more concrete by illustration in a little while. But you will want to bear them in mind as you go along in considering whether or to what extent you may consider any acts or declaration of any of these alleged conspirators as binding upon or

affecting any other alleged conspirator.

You should consider in this connection, for example, that the defendant George Harris contends that the evidence against him relates only to the period from February or March of 1970 until December of that year. It is argued on behalf of Mr. Harris that whatever may or may not be shown up to December 1970, he could not be deemed to have been in the alleged conspiracy after that.

t7pm

1 The Government, on the other hand, points to
2 the introduction of Alan Morris to Jermain and Ramos by
3 George Harris, and contends that this and other activities
4 of Morris and other evidence which it claims to have pro-
5 duced may be found by you to show Harris' continuation as
6 a conspirator after December of 1970.

7 In addition, the Government relies here on
8 the concept I mentioned just a while ago, that a person,
9 once shown to be a member of the conspiracy, may be found,
10 depending on the jury's judgment in every instance, may be
11 found to have stayed a member until or unless there is
12 positive evidence that he withdrew.

13 Now you will consider these contentions as you
14 think about the case of Mr. Harris, in deciding what if any
15 acts and declarations of any other people at any given
16 time may be taken into account by you in deciding the
17 question of his guilt or innocence.

18 Remember that with him, as with others, for
19 any time during which you are not satisfied that he was a
20 member, no acts or declarations of any other people may
21 be considered against him.

22 Similar considerations, similar principles,
23 though the details and the circumstances are different,
24
25

apply with respect to the defendant Robert Jermain.

As to him, you will recall the arguments that the evidence at most deals with him from somewhere early in 1970 until about November 10, 1971, when Ramos was arrested in New York for his alleged involvement in the Toledo seizure of the suitcase, allegedly containing heroin and cocaine.

Again, the defendant Jermain asserts that nothing after that November time could be deemed to connect him with the conspiracy, and that no evidence of anybody else's actions or statements after that time may be considered against him.

The Government again contends that Jermain's membership in the conspiracy has been shown to extend to November 10, 1971, and that there is no showing of withdrawal thereafter so that you may find he continued to be a member.

Again, for any period where you are not satisfied that he was a member, you may not consider anybody else's acts or declarations against him.

Similar thoughts and instructions apply again in different circumstances to the situation of Alan Morris.

You will recall the undisputed fact that Morris was taken into custody on October 31, 1971. As

2 to him, I give you this very simple instruction. I instruct
3 you that whatever you find may have been the situation
4 before that date, before October 31, 1971, you may not
5 consider against Morris any acts or declarations of other
6 people occurring after that date.

7 I come now to the third essential element,
8 the requirement of proof of at least one overt act.

9 If you find that there was the kind of conspir-
10 acy alleged, and if you find that one or more defendants
11 were members, you must still find beyond a reasonable doubt
12 proof of at least one overt act before you may convict.

13 An overt act in this context means very simply
14 some act committed by a conspirator, one on trial or any
15 other one, as part of the effort to carry out or accomplish
16 one or more objects of the conspiracy.

17 The overt act need not be a crime in itself,
18 but it must, as I say, be something done to further, to
19 achieve success of the conspiracy.

20 The theory of that, which may or may not interest
21 you but it is very brief, is simply this, that people might
22 make an agreement or might talk as though they were agreeing
23 to violate the criminal law and then they might do nothing
24 as a step toward carrying that out.

25 It has been thought that if that occurs, only

2 talk of that nature, the result ought not to be criminally
3 billed. And as a safeguard in our law of conspiracy there
4 is this requirement of proof of at least one, though there
5 need not be proof of more than one, overt act.

6 The conspiracy count, Count 1 in this case,
7 alleges eight overt acts. You will recall that when I
8 was reading this document of the indictment to you before,
9 I stopped before this portion. Let me pick up the reading
10 and read to you the allegations of overt acts.

11 It says: In pursuance of the said conspiracy
12 and to effect the objects thereof, the following overt acts
13 were committed in the Southern District of New York and
14 elsewhere.

15 (1) On or about November 5, 1970, defendants
16 Robert Jermain, Earl Simms, George Harris, and co-conspirator
17 Joaquin Ramos, met at Tom's Villabianca Restaurant,
18 Bronx, New York.

19 (2) On or about November 5, 1970, co-conspirator
20 Joaquin Ramos met in the Bronx, New York, with defendant
21 Stephen Dellacava, and negotiated for the sale of a quantity
22 of heroin.

23 (3) In or about May 1971, co-conspirator Joaquin
24 Ramos met with defendants John Capra and Leoluca Guarino.
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2 experience, what they saw, heard directly relating to
3 whatever facts may be in controversy in the particular
4 case.

5 There are lots of exceptions to that, but the
6 one exception I want to talk to you about here is the
7 exception for the so-called expert witness.

8 Witnesses who have become or who claim they
9 have become expert in some art, science or profession or
10 calling, expert by virtue of education or experience or
11 both, may be presented by a party as expert witnesses and
12 may state their opinions as to matters involved in the
13 case along with the reasons for their opinions, and of
14 course, they may be cross-examined on all of that.

15 You have heard, I think, subject to your recollection,
16 six people in this case who testified partly or
17 wholly in the role of experts.

18 You heard two United States chemists, Mr. Roger
19 Fuelster, and Mr. Robert A. Henderson, Dr. S. C. Chen, an
20 associate professor of pathology at the Medical College
21 of Ohio; Mr. Luciano V. Caputo, an examiner of questioned
22 documents; Mr. Samir Sulayman, a registered medical technologist,
23 and Dr. Jerome Allen Levin, assistant professor
24 of pharmacology at the Medical College of Ohio.
25

These people, in one aspect or another, have placed their opinions about one thing or another before you. It is for you, the jury, to give to those opinions such weight as you think they deserve.

On the subjects respecting which they testified, as on all others, the ultimate decision on the facts is for you.

If you decide that the asserted opinion of an expert is not based upon sufficient education or experience, or if you conclude that the reasons for the opinion are not sound or persuasive, or if you find the opinion outweighed by other evidence, you may reject it entirely, or you may give it such weight and significance in the whole case as you think it deserves.

Here and throughout, while you must consider all the evidence and weigh it and place it in its setting, remember that the ultimate issues are those that I have given to you, and not ultimately your choice as between experts on issues which may not in the end be ultimate or decisive for the case.

All of that is for you, and where the expert testimony fits, what you may infer from it as I say are matters for your sovereign, final, and exclusive judgment.

2 Now, including the experts, you have been re-
3 minded that you have heard a total of something approaching
4 50 witnesses. You have also heard some argument about the
5 significance or possible significance of people who might
6 arguably have been called as witnesses but did not appear
7 actually to testify before you.

8 The significance of this is for you to judge.
9 You may conclude in your judgment that your primary and
10 overriding task will be to analyze and appraise the testi-
11 mony and other evidence that has actually been placed before
12 you. On the other hand, as I say, it is for you to
13 weigh, in your good judgment, the contentions you have
14 heard and the significance of the contentions you have
15 heard about people who did not appear as witnesses.

16 The law on this subject is very simple. There
17 isn't any presumption against any party in a lawsuit
18 from the failure of that party to call a witness, if you,
19 the jury, should find that the testimony that witness might
20 arguably have given would be merely cumulative or repetitive,
21 and would not be of greater value than that of witnesses
22 who did appear and did testify.

23 On the other hand, if you find that it was
24 peculiarly within the power of either the prosecution or
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2 the defense to produce a witness who could have given mater-
3 ial testimony on some issue, the failure to call that witness
4 may give rise to an inference, if the jury finds it warranted,
5 that his testimony would have been unfavorable to that
6 party.

7 You will bear in mind throughout, of course,
8 as I told you earlier, that the law never imposes on a defend-
9 ant in a criminal case the burden or duty of calling any
10 witness or producing any evidences.

11 In this same connection, you are reminded that
12 in our system of criminal procedure both sides have the
13 right to interview witnesses before and even during the
14 trial. Both sides have the right to request or demand
15 that witnesses appear in court and to seek an order of the
16 Court in the form of what we call a subpoena, to compel
17 a witness so to appear and testify.

18 Have these things that I just mentioned in mind
19 in considering what significance, if any, to give to the
20 failure of anybody to call any person about whom you have
21 heard in the course of argument in this case.

22 Now I come to what in a sense is always the crux
23 of the matter for the jury and any trier of fact in deciding
24 contested issues of fact, the subject of credibility.
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2 I am sure you will realize, whether I had in-
3 structed you about it or not, that you have to make a
4 judgment about credibility in deciding with respect to each
5 witness to what extent you may rely upon him or her for an
6 account of the facts you are seeking to discover.

7 So it is a critical task. But it is not
8 especially technical, and it is not legalistic. Lawyers
9 and Judges do not, by training or otherwise, have any
10 special expertise or competence in deciding questions of
11 credibility. The instructions we give you on such a subject
12 are more in the nature of reminders than novel information.

13 You are all mature citizens. You all have
14 experience of the way the world works and the way people
15 behave. Our system contemplates and anticipates that people
16 like you come to the courthouse bringing with you the
17 collective benefit of your wisdom and of your experience in
18 deciding these key questions of credibility.

19 And so, as you counsel together, you will
20 undoubtedly be considering and appraising the witnesses you
21 have heard.

22 Did the witness, any one or other, appear to be
23 truthful, candid, frank and forthright? Or did he seem
24 evasive or shifty or otherwise suspect?

25 Did he appear to know what he was talking about?

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2 And perhaps more importantly, did he or she
3 appear to intend to give you faithfully what he knew or
4 remembered about the events in question?

5 Was the witness consistent or self-contradictory?

6 How did the direct examination compare to the
7 cross? What motive if any did any particular witness
8 have to lie?

9 You have heard argument about this, and I will
10 refer to it specifically in a minute.

11 But you will consider with any witness the
12 question of his interest or possible interest in the case
13 and how this may have affected his testimony.

14 A witness may want to help a friend. A witness
15 may be a law-enforcement person wanting to vindicate his
16 position. Other motives of all kinds that you know about
17 and can think about may conceivably generate an interest
18 that might affect the testimony you have been given.

19 Now, obviously the fact that a witness is
20 interested does not mean that we should disregard his testi-
21 mony. If that were so, we would handle the matter very
22 simply by never allowing a witness, who is interested, to
23 appear, and then we commonly could not get facts about
24 issues in litigation.
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2 I mention interest, of course, not because
3 it disqualifies, but simply, as I say, as a reminder of
4 a factor you want to take into account.

5 A witness may be discredited or impeached, as
6 lawyers say, by showing that at some time in the past he
7 has made statements inconsistent with things he said here
8 on the witness stand.

9 A witness may be discredited or impeached by
10 showing that he has been convicted of a felony, that is, a
11 crime punishable by a term of years in prison.

12 Again, prior conviction or prior inconsistent
13 statements do not make a witness incompetent to testify.
14 They are circumstances for you to take into account and
15 weigh in appraising credibility.

16 As I have said, among the circumstances will
17 certainly be the demeanor of the witnesses. And along with
18 these other factors I have mentioned, let me say simply
19 that these are illustrative only. Other things will occur
20 to you, and you will reason together about what your exper-
21 ience tells you in deciding how far you may rely upon any
22 of the witnesses you have heard.

23 If you conclude that any particular item or
24 portion of the testimony you have heard was inaccurate
25 or untruthful, you want to consider whether this was the

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2 result of mistake or deliberate falsehood. You want to
3 consider the nature of any inaccuracy that you find, and
4 consider its size and moment or triviality or lack of
5 moment in the setting of the case taken as a whole.

6 You want to consider if any witness has been guilty
7 of inaccuracy, how far if at all you may rely on other
8 parts of his testimony.

9 If you believe that any witness has testified
10 wilfully falsely to any material fact it is within your
11 prerogatives to disregard all his testimony, or you may
12 credit the portions that you believe should be credited in
13 reaching a fair account and determination of the facts
14 in question.

15 Remember, as I think we considered when you
16 were being selected to sit here, that no witness is en-
17 titled in advance to any more or less credit based on his
18 position or his status or which party called him. The
19 mere fact that a party may have been called by the Govern-
20 ment, that is a witness may have been called by the Govern-
21 ment, does not entitle that witness to more credit in ad-
22 vance of your appraisal of him than you should give to
23 any other witness. Nor does it mean that you should credit
24 him less in advance.

25 What I am saying is each one needs to stand

1 on his own feet and be appraised as an individual under
2 the general principle of equality that we try to follow
3 in the courthouse.
4

5 I come to a particular aspect of the subject
6 of credibility which has been much discussed in summations
7 and which undoubtedly will be among the things you will
8 consider in the jury room.

9 You have heard testimony in this case from
10 witnesses who are variously described as informants and
11 accomplices, people who have supplied the Government with
12 information or cooperated, as the expression is used, and
13 in several instances were themselves involved in criminal
14 conduct of the kind you are about to consider in this
15 case.

16 I don't think it is necessary to remind you,
17 but I do, that these terms, informant or accomplice,
18 describe the witnesses Joaquin or John Ramos, Rocco Sassone,
19 Earl Simms, and Joseph Conforti.

20 You will recall that Simms and Conforti have
21 pleaded guilty to offenses closely connected with the
22 matters involved in this case.

23 Ramos is serving a sentence from which he
24 expects release in Ohio as a result of his cooperation,
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2 though it also appears that he faces some uncertainty as
3 to the question of parole revocation and possible imprison-
4 ment for Federal parole violation.

5 You have heard that the families of Conforti
6 and Ramos have been receiving support from the Government
7 while these men serve as witnesses.

8 You know that Ramos has not been prosecuted
9 for his part in matters involved in the trial before you.
10 Sassone, whose role as an accomplice, if it was that,
11 appears to have been relatively minor, has likewise not been
12 prosecuted for any matters connected with this case.

13 And there are a few propositions to give to
14 you generally about witnesses of this kind.

15 Your experience and your knowledge of how the
16 world works make you aware that the Government frequently
17 deems itself compelled to rely upon the testimony of informants
18 or accomplices to the alleged crimes in question, and
19 generally of persons who have criminal or otherwise unsavory
20 records.

2 The government takes the position and there is
3 no dispute about this, that it must take the witness as it
4 finds them and this has been thought to be particularly
5 true in the prosecution of conspiracy cases.

6 It is claimed that the only people who are
7 members or were members of the alleged conspiracy have
8 evidence which is relevant and useful in the prosecution
9 of the charge. There is no prohibition against the use of
10 accomplice or informant testimony. Under the Federal Law
11 which applies here, the testimony of an accomplice may be
12 sufficient in itself, without corroboration, to authorize
13 a conviction, if that testimony is found by the jury to
14 meet the government's burden of proof beyond a reasonable
15 doubt.

16 You must be instructed, however, and you are
17 instructed, to scrutinize such testimony with particular
18 care and to view it with particular caution in
19 determining whether it is credible.

20 Among the factors that you will want to take
21 into account in assessing credibility, is the evidence and
22 the arguments you have heard as to what the motives of these
23 witnesses were or might have been in giving testimony they
24 placed before you. Was that testimony a fabrication in
25 whole or in part, induced by benefits already conferred

or expected?

Was the witness lying because of some promise or a belief that he may receive favorable consideration concerning his own difficulties with the law?

Or did the witness as a matter of conscience or for other reasons take the stand and take the oath and tell you the truth in whole or in part?

Did he believe, in short, and I instruct you to ask this with respect to each of these witnesses, that he would best help himself in his trouble with the government and elsewhere by making false accusations or by telling truthfully damaging things that he knew firsthand?

With these witnesses as with all others, you will consider the specific questions I have invited you to consider, and all the circumstances surrounding them and their testimony, and make in that way your vital judgments as to credibility.

I am approaching the end of these instructions. Let me simply charge you briefly that when you go to the jury room your task, your sovereign task, is to decide guilt or innocence.

In deciding that I charge you not to be diverted by speculations concerning questions of punishment or possible punishment. Guilt or innocence is

your first and primary question. If anyone is convicted the question of sentence, based upon other considerations is for the trial judge. So I will simply tell you not to be diverted by speculation on that subject.

When you go to deliberate, ladies and gentlemen, remember that there will be 12 of you and that the purpose of having 12 is the obvious one, of having you reason together. That means that each of you is entitled to have and express your own good judgment on the questions, the serious questions, entrusted to you.

At the same time it is expected, obviously, that you will exchange views with your fellow jurors. You will be prepared to listen attentively and where reason so dictates, and your conscience, to change an opinion you may have held which is shown to be erroneous. In the end, however, remember that the verdict, if and when you reach one, must represent the individual judgments and consciences of each member of the jury.

So you are not required to sacrifice or give up or forego a conscientious view simply because you are outnumbered at any given time. You must and you may give up your rational judgment if you are persuaded in reason and in conscience that you should change it.

While you are deliberating if you need to hear

again any of the testimony, send us a note through your foreman and we will find it with the help of our reporter and we will supply it to you as promptly as possible.

If you wish to see any of the exhibits, send a note about that, describe them the best way you can, and, again, we will undertake to supply that need.

If at any time while you are sending notes don't tell us how the division stands, don't tell us the vote. That is a private subject for the jury room and not a concern of ours.

Remember that there are five counts in this indictment, there are six defendants in count one, four defendants in each of counts 2, 3, 4 and 5. You will be asked through your foreman, if and when you have a verdict, to give it orally, separately with respect to each count and each defendant. We will ask your verdict under count 1 as to each of those names and similarly go on through counts 2, 3, 4 and 5.

Now, ladies and gentlemen, before I excuse our alternates, which I will do in a few minutes, I must consult briefly with counsel and that will be an occasion to give you what will be your last recess before you deliberate. Recess for a few minutes more or less while we talk together about whether there are any other or

further or different things that I ought to tell you.

(Jury left the courtroom.)

THE COURT: All right, exceptions.

MR. SLOTNICK: Yes, your Honor.

I would except to your Honor's refusal to take charge in number 1, 13, 14, 15, 17, 20 and 24 of my original requests to charge, together with numbers 4, 7, 8, 10, 14 and 20 of my supplemental requests.

I ask your Honor to charge the last paragraph of my original charge 24 in which I asked you to charge moral certainty with respect to reasonable doubt and also inconsistent conclusions in facts, so balanced that you can find either conclusion, you must find in favor of the defendant.

I would further ask your Honor to charge that with respect to Counts 2 and 3, that before they could convict they must find beyond a reasonable doubt that John Capra was a seller of narcotics to Harris and Morris.

Also, I object to your Honor's charge with respect to Counts 4 and 5 that Exhibits 86A through K were heroin or cocaine. The question is whether they

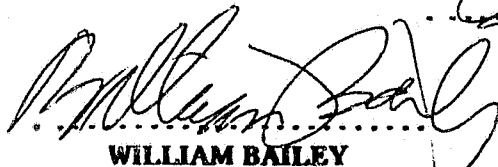
were heroin and cocaine in October 1971. Your Honor charged that they are presently and that is not the object of the indictment.

AFFIDAVIT OF PERSONAL SERVICE

**STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:**

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of March, 19 74 at No. FOLEY SQUARE deponent served the within APPENDIX upon U.S. ATTORNEY the APPELLEE herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the atty. for appellee.

Sworn to before me,
this 20 day of March 19 74


.....
WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1973


.....
Edward Bailey